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NO. 84-1289

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

PORT TERMINAL RAILROAD ASSOCIATION,
Petitioner

v.

ROY W. SIMS,
Respondent

REPLY BRIEF OF PETITIONER

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I

LIST OF PARTIES

Petitioner—Port Terminal Railroad Association.[1]

Respondent—Roy W. Sims.

1. The Port Terminal Railroad Association is an association of railroads composed of the Missouri-Kansas-Texas Railroad Company of Texas, a corporation; Southern Pacific Transportation Company, a corporation; Burlington Northern Railway Company, a corporation; Houston Belt & Terminal Railway Company, a corporation; Missouri Pacific Railroad Company, a corporation; and the Atchison, Topeka & Santa Fe Railway Company, a corporation.

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To The Supreme Court Of The United States:

ARGUMENT AND AUTHORITIES

A. Respondent's Discharge and the FELA.

Respondent, in his Brief in Opposition, has attempted to maintain two contradictory positions on his discharge by Petitioner. First, Respondent implies that his discharge was in retaliation for his injury claim. At the same time, however, Respondent alleges that the discharge was totally irrelevant to the present claim. The very question presented, as reformulated by Respondent, of "whether a railroad can cripple an employee one

day, [and] fire him the next day on charges of the same negligent man who crippled him, . . ." (Brief p. I) demonstrates that Respondent views this issue as a wrongful discharge claim.

If Respondent's discharge was wrongful, however, the proper remedy under the Railway Labor Act was a direct appeal of the discharge itself. Having foregone his right to appeal, his discharge is valid and final. Respondent may not now use his FELA claim to recover damages based upon an alleged wrongful discharge.

Respondent also argues that the writ should be refused in this case to deter wrongful discharges, since the discharge could limit FELA damages. One major flaw in this analysis is that while such a discharge may result in a smaller recovery under the FELA, it would subject the Railroad to damages for wrongful discharge under the Railway Labor Act. The Railroad's net position would not be improved by the discharge.

Respondent's position on the discharge requires this Court to assume that (1) the Railway Labor Act itself does not remedy and thereby deter wrongful discharges; (2) that the proper purpose of an FELA action is to remedy and prevent discharge of employees; and (3) that the decisions of the Texas courts would act as an effective deterrent and remedy for a discharged employee. Respondent has offered neither facts nor logic to support these assumptions.

It is especially ironic that Respondent should both seek to punish Petitioner for the alleged wrongful discharge and deter it from making such discharges in the future, when Petitioner has shown that at the time Respondent was fired no claim for injury had been made.

Respondent did not report his injury until seventeen days after his discharge. Not only did Petitioner have no incentive to discharge Respondent because of an unknown injury claim, but Respondent had a motive for filing a retaliatory injury suit because he was discharged. The rulings of the Texas courts thereby appear to encourage employees to retaliate against a railroad that has validly discharged them, by filing an FELA suit seeking to recover the loss of earnings that could not be recovered under the Railway Labor Act because the discharge would be upheld. This result undermines the procedures mandated by the Railway Labor Act in favor of state common law remedies.

B. Basis of the Texas Court's Opinion.

Respondent contends that it is unfair to state that the Texas Court of Appeals relied upon state, rather than federal law, in deciding the issues on the effect of the discharge in this FELA suit. A detailed examination of the opinion of the Court of Appeals, (Appendix A to the Petition for Writ of Certiorari), reveals a total lack of other authority for its holding. The Court prefaced its discussion of this issue with the statement that "[t]he nature and extent of the evidence required to establish damages resulting from lost earning capacity was considered by the Supreme Court of Texas in *McIver v. Gloria,* 169 S.W.2d 710 (Tex. 1943), ..." This and other state court cases discussed by the Court of Appeals set forth the usual rule, that it is normally proper to consider a Plaintiff's occupation, effect of the injury thereon, physical ability to perform his work at the time of injury and thereafter, and his earnings before and after the accident. The cases previously cited

by Respondent establish, however, that in an FELA case additional facts could restrict a plaintiff's prior earnings as a basis for recovery. *Rogers v. Thompson,* 265 S.W.2d 282 (Mo. 1954); *Sharkey v. Penn Central Transportation Co.,* 493 F.2d 685 (2nd Cir. 1974). Nowhere in the Texas Court of Appeals' opinion is there any authority, state or federal, that under the circumstances of this case Petitioner could not introduce Respondent's discharge as evidence of the cause of his loss of earning capacity. The only federal case cited by the Court of Appeals was *Kelly v. New York, New Haven and Hartford Railroad Co.,* 138 F. Supp. 82 (D.C. Mass. 1956), which held that it was error to admit evidence of discharge over the defendant's objection. This is obviously no authority for a refusal to admit evidence offered by the defendant.

Likewise, the two federal cases cited by Respondent in support of the opinion below, merely hold that evidence of discharge cannot be used *by the plaintiff* to bolster his recovery in an FELA case. Thus, for example, in *Beanland v. Chicago, Rock Island and Pacific Railroad Co.,* 480 F.2d 109 (8th Cir. 1973) the Court refused to admit evidence of discharge, even though the plaintiff contended it was relevant on the issue of mental anguish. The Court's holding was to the same effect in *Kelly v. New York, New Haven and Hartford Railroad Co.,* 138 F. Supp. 82 (D.C. Mass. 1956). In both of these cases the Defendants opposed admission of the evidence, which the courts viewed as potentially prejudicial to the Railroads. Respondent, however, has offered no authority that a Defendant cannot prove the discharge when, as in this case, it is relevant on the issue of earning capacity.

In the trial court, Respondent claimed decreased earning capacity because of his inability to work, allegedly as a result of his injury. His only evidence of past and future wages was in the railroad industry. Finally, Respondent informed the jury that he was injured on April 30, 1981, left work on May 1, and never returned to work as a railroad engineer, implying that this was solely because of his injuries.

The jury was not told of the real reason for Respondent leaving work early on May 1, namely his discharge for insubordination. Neither was the jury informed that after May 1, Respondent was not entitled to work for Petitioner as a result of his discharge and would have been unlikely to obtain other similar employment as a result of having a discharge for insubordination on his record. The jury was misled into believing that Respondent left his shift early on May 1, and never returned, solely because he was in such pain and was so injured that he could not continue to work. This result occurred because the Texas courts ignored federal and other decisions on damages in an FELA case cited by Petitioner and relied upon Texas common law. The net result of the Texas courts' opinions in this case will be an undermining of the administrative process established by the Railway Labor Act, which this Court has held to be the exclusive arbiter of claims for wrongful discharge. The state courts will thereby be encouraged to substitute state law measures of damages and ignore contrary federal authority in FELA cases.

CONCLUSION

For the foregoing reasons, the Petition For Writ of Certiorari should be granted, or, alternatively, this cause should be summarily reversed on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gordon A. Holloway, a member of the bar of this Court, do hereby certify that on the _____ day of April, 1985, three copies of the foregoing brief were sent by certified mail, return receipt requested, to Tom R. Letbetter and George Payne, counsel of record for Respondent, at 715 Houston Club Building, Houston, Texas 77002, in compliance with Rules 19.3 and 28.5(b) of the Rules of the Supreme Court of the United States.

GORDON A. HOLLOWAY